TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 655

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, ET AL., ETC., PETITIONERS,

vs.

INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 27, 1940.

CERTIORARI GRANTED FEBRUARY 3, 1941.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 655

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON AND FRANK G. THOMPSON, ETC.,

Petitioners,

vs.

INGRAM - RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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TRANSCRIPT OF RECORD

IN THE

United States Circuit Court of Appeals
For the Seventh Circuit

INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.,
Plaintiff-Appellee,

7198 *vs.*

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON AND FRANK G. THOMPSON, ETC.,
Defendants-Appellants.

INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.,
Plaintiff-Appellant,

7199 *vs.*

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON AND FRANK G. THOMPSON, ETC.,
Defendants-Appellees.

Appeals from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

TRANSCRIPT OF RECORD FILED JAN. 16, 1940.
PRINTED RECORD.

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IN THE

United States Circuit Court of Appeals
For the Seventh Circuit

INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.,
Plaintiff-Appellee,

7198 *vs.*

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON AND FRANK G. THOMPSON, ETC.,
Defendants-Appellants.

INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.,
Plaintiff-Appellant,

7199 *vs.*

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON AND FRANK G. THOMPSON, ETC.,
Defendants-Appellees.

Appeals from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

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TRANSCRIPT OF EVIDENCE.

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1 Pleas of the District Court of the United States for the Southern District of Indiana, at the United States Court House in the City of Indianapolis, in said District, before the Honorable Robert C. Baltzell, Judge of said District Court. Placita.

Ingram - Richardson Manufacturing Company
vs.
Department of Treasury of the State of Indiana, *et al.*
} No. 63, Civil.

Be It Remembered that heretofore to wit: at the November Term of said Court, on the 15th day of March, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following proceedings in the above cause were had, to wit:

Comes now the plaintiff by its attorneys, and files complaint in the above entitled cause, which is as follows:

Filed Mar. 15, 1939.

IN THE UNITED STATES DISTRICT COURT,

Southern District of Indiana,

Indianapolis Division.

Ingram-Richardson Manufacturing Company of Indiana, Inc,
Plaintiff,

vs.

Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana,
Defendants.

Cause No. 63. Civil.

COMPLAINT FOR REFUND OF GROSS INCOME TAX.

Filed March 15, 1939.

Plaintiff complains of defendants and alleges that:

1. Jurisdiction is founded on the existence of a federal question and amount in controversy. Of the tax sought to be recovered herein, the assessment of $5,410.20, excluding interest, was illegal because of Article I, Section 8, of the Constitution of the United States, and the assessment of the balance of $1,154.28, excluding interest, was illegal for the reason hereinafter set forth. The matter in controversy, exclusive of interest, and costs, exceeds the sum of $3,000.00.

2. Plaintiff is an Indiana corporation, whose principal place of business is at Frankfort, Indiana. Defendant Department of Treasury of the State of Indiana is an executive department of said state vested with the enforcement and application, through an administrative division known as the Gross Income Tax Division, of the Indiana
3 Gross Income Tax Act of 1933 (Chap. 50, Acts of 1933, as amended by Chap. 117, Acts of 1937). Defendants M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson constitute the Board of Department of Treasury of the State of Indiana.

3. On July 1, 1938, defendant Department of Treasury notified plaintiff that said defendant proposed to assess an additional tax against plaintiff in the amount of $6,564.48 for the second, third and fourth quarters of 1937, and on or about July 14, 1938, plaintiff filed with said defendant a written protest against such proposed assessment and fully stated therein the grounds of such protest. A hearing on such protest was thereafter held by defendant Department of Treasury but on or about February 13, 1939, said defendant denied said protest and ruled against plaintiff with respect thereto.

4. On February 16, 1939, defendant Department of Treasury assessed against plaintiff said additional tax and issued a notice and demand to plaintiff therefor, together with interest in the amount of $613.13, totaling $7,177.61, which total amount plaintiff paid on February 20, 1939.

5. On February 23, 1939, plaintiff, on a form prescribed by the defendant Department of Treasury filed with said defendant its verified petition for a correction of the amount so paid by plaintiff to said defendant, and for a refund thereof. In said petition plaintiff set forth the amount which it claimed should be refunded and the reasons for such claim. Said defendant denied said claim and petition on February 23, 1939, and on said date notified plaintiff in writing of such denial. Defendants have refused to pay to plaintiff any part of or all said additional tax.

6. Of the aforesaid additional tax, excluding interest, $5,410.20 was based upon plaintiff's receipts from its
4 customers outside Indiana, and the balance of $1,154.28 was based upon plaintiff's receipts from its customers in Indiana. All said receipts arose out of the following course of transactions:

Plaintiff owns and operates a manufacturing plant at Frankfort, Indiana. Plaintiff is, and during 1937 was, engaged in enameling parts used by manufacturers of stoves, refrigerators and other products. Plaintiff's traveling salesmen solicited and negotiated orders from such manufacturers in various states. The original purchase order forms delivered to plaintiff by such manufacturers were the same forms used generally by them for the purchase of materials. After plaintiff accepted these purchase orders, the stove, refrigerator or other parts, all of plain, unenamelled metal, were transported, ordinarily by plaintiff's trucks, from the respective manufacturers' plants to plaintiff's plant and were there enamelled by plaintiff.

Such enameling was essentially a manufacturing process, and required large, expensive ovens and machinery and extensive labor whereby vitreous materials were added to and fused with the plain metal parts furnished by such other manufacturers. There resulted enamelled and highly polished articles which were then transported, likewise in plaintiff's trucks, to such other manufacturers for assembly into the finished products. Plaintiff thereafter billed such manufacturers for the prices of the enamelled parts and remittances on such billings were made by mail.

The value of the plain metal parts furnished by such manufacturers was in each instance very considerably less than the value thereof after plaintiff, by the addition of materials and performance of labor as aforesaid, enamelled such parts. In most instances such latter value was at least 300% of the former.

5 7. The aforesaid assessment was illegal, and plaintiff is entitled to recover it because

(a) plaintiff's receipts upon which $5,410.20 of said assessment is based were from sales in interstate commerce, and as applied to such receipts, said Gross Income Tax Act and the assessment of said amount constitute a regulation of and burden upon interstate commerce in violation of Article I, Section 8 of the Constitution of the United States; and

(b) plaintiff's receipts upon which $1,154.28 of said assessment is based were from wholesale sales as defined in the aforesaid act (Acts 1937, Chap. 117, Sec. 3, a-3) and were therefore taxable at the rate of ¼ of 1 per cent, as originally returned and paid by plaintiff, instead of 1 per cent, as assessed by defendant Department of Treasury.

Wherefore, plaintiff demands judgment against defendants for $7,177.61, interest, costs, and all other proper relief.

Earl B. Barnes,
Charles M. Wells,
Attorneys for Plaintiff,
Fletcher Trust Building,
Indianapolis, Indiana.

Barnes, Johnson & Wells,
Fletcher Trust Building,
Indianapolis, Indiana.
Of counsel.

6 And afterwards to wit at the November Term of said Court, on the 5th day of April, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit: Filed Apr. 5, 1939.

Come now the defendants by their attorneys and file answer, which is as follows:

7 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—63) * *

ANSWER.

Come now the defendants, Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson as and constituting the Board of Department of Treasury of the State of Indiana, and for answer to the plaintiff's complaint herein state:

1. The defendants admit so much of the paragraph designated as "1" of the plaintiff's complaint as alleges that the jurisdiction is founded on the existence of an alleged federal question and the amount in controversy, and that the matter in controversy, exclusive of interest and costs, exceeds the sum of three thousand dollars ($3,000) and is in the amount of five thousand four-hundred ten dol-

8 lars and twenty cents ($5,410.20); but the defendants deny the allegation that the gross income taxes sought to be recovered in this action were illegally assessed and collected in view of the provisions of Article I, Section 8, of the Constitution of the United States of America, and deny that the Gross Income taxes sought to be recovered in this action were illegally assessed and collected for any reason whatsoever.

2. The defendants admit so much of the paragraph of the plaintiff's complaint designated as "2" as alleges that the plaintiff is an Indiana corporation, whose principal place of business is at Frankfort, Indiana, and that the defendant, Department of Treasury of the State of Indiana, is a department of the State Government of Indiana created by Chapter 4 of the Acts of the General Assembly of Indiana of 1933, to which department has been assigned by executive order of the Governor of the State of Indiana the enforcement of the provisions of Chapter 50 of the

Acts of the General Assembly of the State of Indiana of 1933 as amended by Chapter 117 of the Acts of the General Assembly of Indiana of 1937, which act is commonly known and designated as the Indiana Gross Income Tax Act, and that the defendants, M. Clifford Townsend as Governor of the State of Indiana, Joseph M. Robertson as Treasurer of the State of Indiana, and Frank G. Thompson as Auditor of the State of Indiana, together constitute the Board of the Department of Treasury of the State of Indiana.

3. The defendants admit so much of the paragraph of the plaintiff's complaint designated as "3" as alleges that on July 1, 1938, the defendant, Department of Treasury, notified the plaintiff that said defendant proposed to assess as an additional tax against plaintiff the amount of six thousand five-hundred sixty-four dollars and forty-eight cents ($6,564.48) for the second, third, and fourth quarters of 1937, and that on or about July 14, 1938, the plaintiff filed with the said defendant a written protest against such proposed assessment and stated therein the grounds of such protest, and that thereafter a hearing was held by the defendant Department of Treasury, and on or about February 13, 1938, the said defendant, Department of Treasury, denied the said protest of the plaintiff and ruled against the plaintiff with respect thereto.

4. The defendants admit so much of the paragraph of the plaintiff's complaint designated as "4" as alleges that on February 16, 1939, the defendant Department of Treasury assessed against the plaintiff said additional tax and issued a Notice and Demand to the plaintiff therefor, together with interest in the amount of six-hundred thirteen dollars and thirteen cents ($613.13), making a total of seven-thousand one-hundred seventy-seven dollars and sixty one cents ($7,177.61) and that the plaintiff paid such amount to the defendant Department of Treasury on February 20, 1939.

5. The defendants admit so much of the paragraph of the plaintiff's complaint designated as "5" as alleges that on February 23, 1939, the plaintiff on a form prescribed by the defendant Department of Treasury filed with said defendant its verified petition for a correction of the amount so paid by the plaintiff to the said defendant and requesting a refund of such amount, and that in the said petition the plaintiff set forth the amount which it claimed should be refunded and the grounds upon which it relied for such

claim; thereafter on February 23, 1939, the defendant Department of Treasury denied such claim and on said date notified the plaintiff in writing of such denial, and that the defendants have refused to pay the plaintiff any part of, or all of, the said additional tax.

6. The defendants admit so much of the paragraph of the plaintiff's complaint designated as "6" as alleges that of the amount assessed as additional taxes as aforesaid, excluding interest, the amount of five-thousand four-hundred ten dollars and twenty cents ($5,410.20) was tax which was based upon the measure which included plaintiff's receipts derived from customers who resided or who were located outside of the State of Indiana, and that the balance of one-thousand one-hundred fifty-four dollars and twenty-eight cents ($1,154.28) was the tax imposed upon the measure of the plaintiff's gross income derived from customers located within the State of Indiana.

6(a). The defendants, further answering the complaint, say that they admit so much of the paragraph designated as "6" in the said complaint as alleges that the gross income by virtue of which the tax alleged in the complaint arose out of the transactions set forth in the said complaint, insofar as it is alleged that the plaintiff owns and operates an enamelling plant in Frankfort, Indiana, and that the plaintiff is, and during 1937 was, engaged in enameling parts used by manufacturers of stoves, refrigerators, and other products, but the said defendants deny that in each case the plaintiff's travelling salesmen solicited and negotiated orders from manufacturers located in various states, the defendants admitting that the plaintiff did have travelling salesmen who solicited and negotiated for orders from manufacturers in some instances, but allege that such was not the case in each instance; that the defendants have no knowledge that the original order forms delivered to the plaintiff by such manufacturers were the same forms used generally by them for the purchase of materials. The defendants allege that after the plaintiff accepted orders for enamelling, the stove, refrigerator or other parts, all of plain unenamelled metal were transported by rail or truck from the respective manufacturers to the plaintiff's plant and were there enamelled by the plaintiff, but the defendants deny that such transportation was furnished and paid for by the plaintiff in such instances.

6(b). The defendants further answering the complaint deny that such enamelling was essentially a manufactur-

ing process; but the defendants admit so much of the paragraph designated as "6" in said complaint as alleges that the enamelling process required large ovens and machinery and labor whereby vitreous materials were added to and fused with the plain metal parts furnished by the original manufacturer of the stove, refrigerator or other part, and the defendants admit that the result of the enamelling process or service was enamelled or highly polished articles which were, after such process was completed, transported to manufacturers; the defendants admit that the plaintiff, after the enamelling process was finished, billed the manufacturers who ordered or contracted for such enamelling for the charge for the enamelling service, which charge included a price determined by the cost of materials and the cost of labor used in fusing the enamelling onto the stove, refrigerator or other parts; the defendants admit that such billings were made through the medium of the United States mails.

6(e). The defendants further answering the complaint say that they have no knowledge that "the value of the plain metal parts furnished by such manufacturers was in each instance very considerably less than the value thereof after plaintiff, by the addition of materials and performance of labor as aforesaid, enamelled such parts", and that "in most instances such latter value was at least three-hundred per cent (300%) of the former."

7. The defendants deny so much of page 4 of the complaint as alleges that the assessment of gross income taxes against the plaintiff was illegal and that the plaintiff
12 is entitled to recover the amount so assessed and paid; and the defendants deny that the plaintiff's gross income upon which five-thousand four-hundred ten dollars and twenty cents ($5,410.20) of the said additional assessment is based, was received from sales in interstate commerce and that as applied to such receipts the said Gross Income Tax Act and the assessment of the said taxes constituted a regulation of and a burden upon commerce between the states in violation of the provisions of Article I, Section 8, of the Constitution of the United States; and the defendants further deny that the plaintiff's receipts upon which one-thousand one-hundred fifty-four dollars and twenty cents ($1,154.20) of the said assessment is based, were receipts derived from wholesale sales as defined in Section 3 of Chapter 117 of the Acts of the General Assembly of Indiana of 1937, and the defendants deny that the proper rate of tax to be applied to such re-

ceipts was the rate of one-fourth of one per cent (¼%) instead of the rate of one per cent (1%) as assessed by the Department of Treasury of the State of Indiana.

8. The defendants, as a further answer to the plaintiff's complaint, say that as to any allegation or averment contained in the said complaint not either admitted or denied heretofore in this answer, the defendants now specifically deny each and all of such allegations and averments.

9. Wherefore, the defendants pray for judgment in their favor, for their costs, and for all other proper relief.

(sgd) Omer Stokes Jackson,
Omer Stokes Jackson,
The Attorney General.

(sgd) Joseph W. Hutchinson,
Joseph W. Hutchinson,
Deputy Attorney General,

(sgd) Joseph P. McNamara,
Joseph P. McNamara,
Deputy Attorney General,
Attorneys for the Defendants.

219 Statehouse,
Indianapolis, Indiana.

13 And afterwards to wit at the May Term of said Court, on the 1st day of May, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit: Entered May 1, 1939.

It is ordered by the Court that the above entitled cause be, and the same is, hereby assigned for trial, Thursday, May 25, 1939, at 9:30 A. M.

14 And afterwards to wit at the May Term of said Court, on the 25th day of May, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Come now the parties by their respective attorneys, and this cause is now submitted to the Court for trial, and the evidence being heard and concluded, the plaintiff is given to and including June 10, 1939, and the defendants are given to and including June 24, 1939, within which to file their respective briefs, and submit their tentative drafts

of special findings of fact and conclusions of law; and the plaintiff is given to and including June 30, 1939, within which to file a reply brief.

It is ordered by the Court that this cause be, and the same is hereby assigned for oral argument on Tuesday, September 5, 1939, at 9:30 A. M.

41 (Entry for December 7, 1939, continued)

Come now the parties by their respective attorneys and each files a copy of the Official Reporter's Transcript of evidence given on the trial, which is as follows:

Filed Dec. 7, 1939.

42 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—63) * *

Official Reporter's Transcript

of the

Evidence Given on the Trial
Indianapolis
May 25, 1939

Filed Dec. 7, 1939.

44 Be It Remembered, That, in the District Court of the United States for the Southern District of Indiana, Indianapolis Division, before the Honorable Robert C. Baltzell, sole Judge of said Court, the above entitled cause, being at issue, came on for trial, without the intervention of a jury, commencing at nine-thirty o'clock in the forenoon on Thursday, May 25, 1939, and the proceedings upon the trial were in the words and figures following, to-wit:

Appearances:

The Plaintiff appeared by Earl B. Barnes, Esq., and Charles M. Wells, Esq., representing Messrs. Barnes, Johnson & Wells, its attorneys.

The Defendants appeared by Joseph P. McNamara, Esq., Assistant Attorney General of the State of Indiana, their attorney.

45 The Court: Do you have a stipulation that you want to file?

Mr. Wells: We have a stipulation. It has not actually been signed.

The Court: That is all right. You can sign that after a while.

The said Stipulation, marked for identification EXHIBIT NO. 1, was admitted and read in evidence and is in the words and figures following, to-wit:

46 Mr. Barnes: We have some oral testimony, your Honor, that we should like to introduce.

The Court: You may proceed.

The Plaintiff, to Maintain the Issues on its Behalf, Offered and Introduced the Following Evidence, to-wit:

RAYMOND H. COIN, a witness called on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Barnes:

Q. What is your name?

A. Raymond H. Coin.

Q. You are the president of the plaintiff company, are you not, Ingram-Richardson Manufacturing Company?

A. I am.

Q. And you are living in Frankfort?

A. Yes, sir.

Q. How long have you lived there?

A. About thirty-nine years.

47 Q. And how long have you been connected with the Ingram-Richardson Manufacturing Company?

A. About twenty-three years.

Q. As president, how long?

A. About a year and nine months.

Q. How many plants has this particular corporation, this company, this plaintiff?

A. The Indiana plant, located at Frankfort. We only have the one plant.

Q. There is another company in Pennsylvania, is there not?

A. Right.

Q. Another corporation?

A. That is right.

Q. The stipulation of facts that has been filed here shows that you are engaged in the business of enameling metal parts for refrigerators and for stoves. You have a plant for that purpose, have you not?

A. We have.
Q. And that is located where?
A. Frankfort, Indiana.
Q. I hand you a photograph marked Exhibit A. (Plaintiff's Exhibit A.) Will you state what that is? That
48 is a picture of the plant, is it not?
A. That is right. It is a picture of our plant.
Q. A front view?
A. A front view, showing all the front views of the several units; that is, the laboratories, Building 1, Building 2 and so forth.
Q. I hand you three other exhibits, marked, respectively, B, C and D. Just state briefly what B is.
A. B is a view of the enameling shop in Building No. 1. It shows several pieces of equipment, racks and so forth for the handling of enamel ware.
Q. And C?
A. Is another view of the enameling department of Plant No. 2. This equipment is used for the enameling.
Q. And D?
A. That is a view of the several trucks that we use for transporting enameled parts to and from our customers.
Q. And how many trucks are shown there?
A. There are possibly a dozen here, but we have had as high as fifteen.
Q. And they are standing in front of the main building, are they?
49 A. They are standing in front of the main building, yes, sir.
Mr. Barnes: We offer in evidence Plaintiff's Exhibits A, B, C and D.
Mr. McNamara: To which the defendants, respectively, object for the reason that such exhibits are not material to the issues formed in this cause.
The Court: You have stipulated the value of this plant. What is the purpose of this?
Mr. Barnes: The purpose of this is, your Honor, as I understand the State, they contend that there is a mere service, and we wish to show it is manufacturing under such circumstances that the title in all these parts, which are furnished originally by these refrigerator and stove companies, when they are enameled, passes to the Ingram-Richardson Manufacturing Company and they are sold, then, to these companies, which brings it within the J. D. Adams Manufacturing Company case.
The Court: Interstate commerce?

Mr. Barnes: Yes.

The Court: I will let them be read in evidence. I
50 don't think they have any value at all.

The said photographs, so offered, respectively marked for identification PLAINTIFF'S EXHIBITS A, B, C and D, were admitted and read in evidence and are in the words and figures following, to-wit:

51 Q. I hand you several papers, here, marked Exhibits E, F, G and H, purporting on their face to be purchase orders.

A. That is right.

Q. You may state whether these were taken at the time of the getting your orders from these concerns, in other states, to do this enameling.

A. That is right. These orders were accepted from our customers, covering enameling of the parts.

Q. Do you, in every case where you agree to do this work, always use a purchase order?

A. We do.

Q. And are these purchase orders typical of the orders that you receive on all of your jobs?

A. I would say that they are.

Mr. Barnes: If the Court please, we offer these in evidence.

The Court: I think that is covered by your stipulation, but let's see.

The stipulation provides that you accept orders from the customers and that they ship their products in to
52 the plant for enameling and then you ship them back? Is that the procedure?

Mr. Barnes: That is right.

The Court: Is there any objection to these exhibits?

Mr. McNamara: No objection.

The Court: Let the record show the exhibits that have been offered up to this time read in evidence.

The said purchase orders, so offered, respectively marked for identification PLAINTIFF'S EXHIBITS E, F, G and H, were admitted and read in evidence and are in the words and figures following, to-wit:

53 Q. I believe it has been shown that all of this work of yours, at your plant, involved in this case, is enameling these parts for refrigerators and stoves? Is that right?

A. Correct.

Q. When you enamel the parts for a stove, are there various parts of the same stove?

A. That is correct.

Q. And you handle them as a group operation for that stove unit or that particular model?

A. That is correct.

Q. Taking all of the parts for one particular stove, taking them as a group, the value of the enameling work is what in comparison with the value of the original metal parts?

Mr. McNamara: To which the defendants, respectively, object on the ground that it isn't material, under the issues offered in this cause, and does not tend to prove or disprove said issues,—

The Court: Read the question.

Mr. McNamara: (Continued.) —and, further, that the witness has not been qualified with reference to the
54 value of such parts.

The Court: Read the question.

(The Reporter read the preceding question as follows: "Taking all of the parts for one particular stove, taking them as a group, the value of the enameling work is what in connection with the value of the original metal parts?")

The Court: Overruled.

A. I would say the total finished part, with the enamel, is equal to two and a quarter to two and a half times the original value of the stampings.

The Court: The original what?

The Witness: The original value of the stampings.

Q. By "stampings" you mean the original metal parts?

A. That is right.

Q. Before you work on them? Is that right?

A. That is right.

The Court: I don't know whether I understand it or
55 not.

They send the product to you before it is made up into a refrigerator or some other product?

The Witness: That is correct.

The Court: It comes to you without being finished? Is that right?

The Witness: Without the enamel processing. That is right.

The Court: And you process it?

The Witness: That is right.

The Court: What is it?

The Witness: About two and a quarter to two and a half times, with the enamel applied, the original value of the steel stamping.

The Court: How is that done: the enameling?

The Witness: I beg your pardon?

The Court: How is that enameling process? How is that carried on?

The Witness: The enameling process. The stamping is first put through a pickling operation. There are about six tanks involved and the piece must be thoroughly cleaned before it goes into the enameling process. After it is
56 thoroughly cleaned—

The Court: That is the pickling bath?

The Witness: That is right. Those pickling baths contain several different solutions, including sulphuric acid, nitrate of soda and clear water rinses. Then after it comes from that department it goes into the enameling department and, on the first coat, is dipped in ground-coat and then fired. Then the first white or second coat is sprayed on and fired—to make a complete part, it must have three coats or two coats of white on top of the ground—and then the third coat is applied—sprayed—and fired.

Q. You speak of pickling as to those parts. Is that true of all parts of a certain character?

A. All steel parts must be cleaned or pickled.

Q. That is, steel parts?

A. That is steel parts.

Q. And that cuts everything right down to the metal?

A. That takes any grease or other impurities off of the steel.

Q. There are also cast iron parts, are there not?

A. Yes, sir.

57 Q. Do you pickle those?

A. Those are sand-blasted.

Q. Those are run through a sand blast?

A. They are cleaned through a sand-blasting operation.

Q. And that is machinery that forces particles of sand against the parts?

A. That is right.

Q. And that also smooths the parts?

A. That is right.

Q. You say heat is applied. That requires large ovens?

A. Correct. We have a gas-fired furnace and ovens measuring some seventy feet in length, in which the temperatures are as high as sixteen hundred degrees Fahrenheit.

Q. And do these parts travel through on automatic conveying equipment?

A. They travel through the firing on conveying equipment, yes.

Q. In refrigerator parts, now, what is the value of the enameling, compared with the original parts, taken as a group?

A. We have found, from what business we have
58 handled there, that the finished refrigerator parts run two and a half to three times the original value of the stampings of the sheet steel refrigerator parts in a raw state.

Q. This enameling that is done on the metal is done with a raw material known as frit? Is that true?

A. That is right.

Q. This frit is a granular material, isn't it?

A. That is right.

Q. And who makes this frit?

A. We make our own frit at the company's plant.

Q. And does that require machinery?

A. Quite elaborate equipment is used for making frit.

Q. And what are the basic materials in frit?

A. Frit is composed of several different ingredients: fluorspar, Cobalt oxide, soda ash and so on. It has fifteen to twenty different ingredients.

Q. You make it in different colors, do you not?

A. Frit is made—there are two kinds of frit. The ground coat is in black because there is considerable Cobalt oxide used in it. Cobalt is used for gripping purposes. It grips the steel. The cover coats are white and, in order
59 to get color cover coats, you must apply the colored oxides in the frit and it goes through another process.

Q. Will you state, roughly, the number of colors you have—just roughly?

A. There are probably fifteen to twenty different shades.

Q. When the enamel is finally on the metal part, how is it—is it fused with the metal part?

A. It fuses or more or less blends into the steel—fuses together. That would be with the ground coat or the gripping coat. It fuses right onto the steel under sixteen hundred degrees and it naturally would blend into more or less one mass.

Q. Is that true also of cast iron parts?

A. Correct.

Q. Then this frit is really melted and fused upon the metal parts? Is that right?

A. That is right.

Q. You have customers, I believe, in Illinois, Ohio, Wisconsin and Michigan? Is that true?

A. That is correct.

Q. And all of those states are involved here in this tax matter?

60 A. That is right.

Q. State whether you were in constant touch with these customers of yours by telephone or telegraph or correspondence.

A. We were.

Q. Explain how and why.

A. Well, it so happens that, in the year 1937, we were very busy and, naturally, we got behind on several jobs and, in that event, customers would continually call by telephone and send in telegrams and many communications by mail. That condition still exists, however. It seems to me as though it is easier to get the information to our sales department and factory by telephone than it is by mail.

The Court: Is this product sent to you by mail or express?

The Witness: It is sent by trucks.

Q. By your own trucks?

The Court: Who furnishes the trucks? Is it sent by common carrier?

The Witness: Our own trucks. We operate our own

61 fleet of trucks.

The Court: That is to say, if you get an order in Detroit from someone who has some product to be enameled, you will send your truck for that product, bring it to your factory to be enameled and then return it?

The Witness: That is correct. As a rule, we make a contract with a customer for his year's requirements or season's requirements and we have a continual haul. We take a load of the finished and bring back a load of raw, after we once get started with the customer.

Q. Would it be possible for you to get this business without that hauling arrangement?

Mr. McNamara: To which we object.

The Court: Objection sustained.

Mr. Barnes: I think that is all, your Honor.

The Court: Cross examine.

62 *Cross-Examination.*

Questions by Mr. McNamara:

Q. Directing your attention to your testimony with regard to the trucks, where you send for the product to bring it back to your plant in your own truck, do you return the product, after it has been enameled, by using your own truck?

A. That is correct.

Mr. McNamara: That is all.

The Court: I understood him to say that they deliver a load and then bring back another load.

Mr. McNamara: Yes, I just wanted to bring that out. That is all.

The Court: That is all.

Witness excused.

Mr. Barnes: That is all that we have.

And the Plaintiff here rested.

And the Defendants here rested.

And this was all the evidence given in the cause.

63 The Court: Now, it will be necessary for you to furnish special findings of fact. We will adopt the stipulation insofar as it goes. You can sign it afterwards.

How long do you want to prepare your special findings and brief? Is thirty days long enough?

Mr. Barnes: Oh, I think two weeks would do, your Honor, and whatever Mr. McNamara wants on his side.

The Court: Let's say June 10th. Is that all right?

Mr. Barnes: That is satisfactory to us.

The Court: And you prepare a special finding of facts, adopting the stipulation, Mr. Barnes.

How long, Mr. McNamara, would you want?

Mr. McNamara: Approximately two weeks, your Honor.

The Court: June 25th is all right, is it?

Mr. McNamara: That will be splendid.

The Court: We will make it the 24th. June 25th is on Sunday.

Then June 30th for a reply brief.

Do you want to argue the case orally?

Mr. Barnes: I think we would like to have an oral argument.

64 The Court: Well, I think, then, we had better assign it later for oral argument or let's make it September 5th. That is the day after Labor Day. Is that all right?

Mr. McNamara: That is all right, your Honor.

Mr. Barnes: The day after Labor Day?
The Court: Yes.
Mr. Barnes: September 5th for the oral argument.
The Court: Yes. These dates will be fixed in one order and you will each receive a copy of it.
Whereupon, the trial was concluded.

15 And afterwards towit at the May Term of said Court, on the 8th day of September, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, towit:

Come now the parties by their respective attorneys, and the Court having heard the evidence and the argument of counsel and being sufficiently advised in the premises, now, pursuant to Rule 52 of the Rules of Civil Procedure, signs and files herein its special findings of fact and states its conclusions of law thereon, which said special findings of fact and conclusions of law are ordered by the Court filed and made a part of the record in this cause, all of which is now done.

16 IN THE DISTRICT COURT OF THE UNITED STATES. Filed Sept. 8, 1939.
* * (Caption—63) * *

SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Findings of Fact.

The Court finds the facts specially herein as follows:

1. Jurisdiction is founded on the existence of a Federal question. The matter in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

2. Plaintiff is an Indiana corporation, whose principal place of business is at Frankfort, Indiana. Defendant Department of Treasury of the State of Indiana is an executive department of said state vested with the enforcement and application, through an administrative division known as the Gross Income Tax Division, of the Indiana Gross Income Tax Act of 1933 (Chap. 50, Acts of 1933, as amended by Chap. 117, Acts of 1937). Defendants M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson constitute the Board of Department of Treasury of the State of Indiana.

3. On July 1, 1938, defendant Department of Treasury notified plaintiff that said defendant proposed to assess
17 thereunder additional tax against plaintiff in the amount of $6,564.48 for the second, third and fourth quarters of 1937, and on or about July 14, 1938, plaintiff filed with said defendant a written protest against such proposed assessment and fully stated therein the grounds of such protest. A hearing on such protest was thereafter held by defendant Department of Treasury but on or about February 13, 1939, said defendant denied said protest and ruled against plaintiff with respect thereto.

4. On February 16, 1939, defendant Department of Treasury assessed against plaintiff said additional tax and issued a notice and demand to plaintiff therefor, together with interest in the amount of $613.13, totaling $7,177.61, which total amount plaintiff paid on February 20, 1939.

5. On February 23, 1939, plaintiff, on a form prescribed by the defendant Department of Treasury filed with said defendant its verified petition for a correction of the amount so paid by plaintiff to said defendant, and for a refund thereof. In said petition plaintiff set forth the amount which it claimed should be refunded and the reasons for such claim. Said defendant denied said claim and petition on February 23, 1939, and on said date notified plaintiff in writing of such denial. Defendants have refused to pay to plaintiff any part of or all said additional tax.

6. Of the aforesaid additional tax, excluding interest, $5,410.20 was based upon plaintiff's receipts from its customers outside Indiana, and the balance of $1,154.28 was based upon plaintiff's receipts from its customers in Indiana. Prior to said additional assessment, plaintiff paid to defendant Department of Treasury of Indiana the gross income tax, at the rate of ¾ of 1%, on plaintiff's receipts upon which $1,154.28 of said additional assessment is based.

7. Plaintiff owns and operates an enameling factory at Frankfort, Indiana. Plaintiff has about ten acres of ground on which are located two main buildings and several smaller buildings. In such buildings are installed various machines, ovens, tools and equipment. Plaintiff also owns and uses in its business various automotive equipment. Plaintiff's investment in said ground, buildings, machinery, tools and equipment was in excess of $400,000. During the last nine months of 1937, the period involved herein, plaintiff had approximately 625 employees, consisting of workmen and foremen in the factory proper, chemists, engineers and an office and managerial staff.

8. Plaintiff is, and during 1937 was, engaged in
18 enameling parts used by stove and refrigerator manufacturers located in Indiana, Ohio, Michigan, Wisconsin and Illinois. Plaintiff's traveling salesmen originally solicited and negotiated purchase orders in said states from such manufacturers. In such purchase orders plaintiff's customers ordinarily set forth the quantity, description and price of the various items of enameling to be done by plaintiff; also set forth shipping and billing instructions and other terms of purchase, such as the following terms among others:

"Do not execute at higher prices than previously quoted or changed without our approval.

"This order is issued with the understanding that if material is not according to our specifications, same will be returned at seller's expense.

"By acceptance and in consideration hereof, the vendor warrants that the above articles do not infringe on any United States patent, that he will defend any suit that may arise in respect thereto, and that he will save the vendee harmless from any loss which may be incurred by the assertion of any patent rights therein.

"If prices are higher than those stipulated on order, make no shipment until permission is granted by us.

"If prices are omitted from order, it is understood and agreed that your billing will be based on the prevailing market prices in effect at time of shipment.

The purchase orders forming the basis of the receipts from the transactions involved herein were orders obtained as aforesaid by plaintiff's traveling salesmen or were repeat orders placed with plaintiff by plaintiff's customers. In addition, plaintiff's enameling superintendent and other officials of plaintiff called at the plants of such customers, from time to time, for the purpose of assisting such customers in designing new parts and working out enameling problems and complaints of such customers. Extensive communication by mail, telephone and telegraph was carried on between plaintiff and such customers in connection with plaintiff's business with such customers.

9. After plaintiff accepted the aforesaid purchase orders, the stove and refrigerator parts, of plain unenameled metal, were transported, ordinarily by plaintiff's trucks, from the respective customers' plants in said states to plaintiff's said plant and were there enameled by plaintiff. Such enameling was a process requiring large expensive

machinery, ovens, tools and equipment as aforesaid and extensive labor whereby vitreous materials were added to and fused with the plain metal parts furnished by such customers. All steel parts were first put through a
19 so-called pickling bath in six different tanks containing various chemical solutions in order to prepare such parts for enameling. Cast iron parts were prepared for the enameling by sand blasting instead of pickling. After the parts were prepared in the pickling department or sand blasting department they were put through plaintiff's enameling department. The first coat of enameling was a dipped ground coat upon the parts which were then "fired," that is, baked in large special ovens seventy feet long having a temperature of approximately 1600 degrees Fahrenheit. The parts traveled through such ovens on special conveying equipment. The second coat of enamel was sprayed on with special spraying equipment and the parts were again fired in said ovens. The third and final coat of enameling was applied in the same manner as the second. The enamel itself was a melted granular substance known as frit. The frit was made by plaintiff in plaintiff's factory, and was composed of flourspar, cobalt oxide, soda ash and numerous other ingredients. Upon the completion of the enameling process there resulted highly polished, enameled articles and these were transported, ordinarily by plaintiff's trucks, to such customers for assembly into the finished products. Plaintiff thereafter billed such customers for said enameling and remittances on such billings were made by mail to plaintiff.

10. The value of the plain metal parts as a unit furnished by plaintiff's customers was in each instance considerably less than the value thereof after plaintiff, by the addition of materials and performance of labor as aforesaid, had enameled such parts. With respect to such parts used in stoves, such latter value was from 2¼ to 2½ times the former, and with respect to such parts used in refrigerators, such latter value was from 2½ to 3 times the former.

(Signed) Robert C. Baltzell,
Judge.

September 8, 1939.

Conclusions of Law.

The court states in its conclusions of law herein as follows:

1. The law is with the plaintiff, in respect of that portion of the claim sued on arising from receipts from plaintiff's customers located outside Indiana, and plaintiff is entitled to recover of and from defendants the sum of Five Thousand Nine Hundred Twenty-One Dollars and Forty-four Cents ($5921.44) with interest according to law.

2. The plaintiff is entitled to recover its costs in this action, taxed at $.....

3. The law is with the defendants in respect of that portion of the claim sued on arising from receipts from plaintiff's customers located in Indiana.

Robert C. Baltzell,
Judge, U. S. District Court for the Southern District of Indiana, Indianapolis Division.

September 8, 1939.

20 (Entry for September 8, 1939, continued.)

Entered Sept. 8, 1939.

It Is, Therefore, Ordered, Adjudged And Decreed that plaintiff have and recover of and from the defendants herein the sum of Five Thousand Nine Hundred Twenty-one Dollars and Forty-four Cents ($5921.44), with interest at the rate of 3% per annum from February 20, 1939, until paid, together with the costs of this action taxed at $.....

21 And afterwards towit at the November Term of said Court, on the 7th day of December, 1939, the following further proceedings were had herein, towit:

Come now the defendants by their attorneys and file notice of appeal to the United States Circuit Court of Appeals for the Seventh Circuit, which notice of appeal is as follows:

Filed Dec. 7, 1939.

22 IN THE DISTRICT COURT OF THE UNITED STATES,

For the Southern District of Indiana,

Indianapolis Division.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff,*

vs.

Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana, *Defendants.*

No. 63, Civil.

NOTICE OF APPEAL.

Filed Dec. 7, 1939.

Notice is hereby given that the Department of Treasury of the State of Indiana and M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana, the defendants in the above-entitled cause, hereby appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the final judgment of the District Court in this cause to the effect that the plaintiff recover from these defendants the sum of Five Thousand Nine Hundred Twenty-One Dollars and forty-four cents ($5,921.44) with interest thereon at the rate of three per centum (3%) per annum from February 20, 1939, until paid, together with the costs of this action, which judgment was entered on September 8, 1939.

23 M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana,

Department of Treasury of the State of Indiana,

Omer Stokes Jackson,
Omer Stokes Jackson,
The Attorney General of Indiana,
Joseph W. Hutchinson,
Joseph W. Hutchinson,
Deputy Attorney General of Indiana,
Joseph P. McNamara,
Joseph P. McNamara,
Deputy Attorney General of Indiana,
Attorneys for Defendants-Appellants.

219 Statehouse,
Indianapolis, Indiana.

Receipt of the foregoing "Notice of Appeal" is hereby acknowledged this 4th day of December, 1939.

Earl B. Barnes,
Charles M. Wells,
Attorneys for Plaintiff-Appellee, Ingram-Richardson Manufacturing Company of Indiana, Inc.

24 (Entry for December 7, 1939, continued.)

And said defendants also file appeal bond in the sum of $250.00 with Hartford Accident & Indemnity Company as surety thereon, which is as follows:

25 IN THE DISTRICT COURT OF THE UNITED STATES. Filed Dec. 7, 1939.

* * (Caption—63) * *

APPEAL BOND.

Filed Dec. 7, 1939.

Know All Men By These Presents, that we, the Department of Treasury of the State of Indiana, and M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana, as principal, and Hartford Accident and Indemnity Company, of Hartford, Connecticut, as surety, are held and firmly bound unto the Ingram-Richardson Manufacturing Company of Indiana, Inc., as appellee,

in the full and just sum of Two-Hundred Fifty Dollars ($250.00) to be paid to said appellee, its successors or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, severally by these presents:

Sealed with our seals and dated this 7th day of December, 1939:

26 Whereas there was rendered on September 8, 1939, in the United States District Court for the Southern District of Indiana, Indianapolis Division, in a suit pending in the said court between the Ingram-Richardson Manufacturing Company of Indiana, Inc., plaintiff, and Department of Treasury of the State of Indiana, and M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana, defendants, a judgment against said defendants, and the said defendants have duly filed a notice of an appeal from said judgment to the United States Circuit Court of Appeals for the Seventh Circuit;

Now, therefore, the condition of the above obligation is such that if the said defendants-appellants shall prosecute this appeal to effect and pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award with the judgment being modified, then the above obligation is to be voided, otherwise to remain in full force and effect.

Department of Treasury of the State of Indiana,

M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana,

By Gilbert K. Hewit.

Hartford Accident and Indemnity Company, Surety,

By B. V. Havens,

B. V. Havens,

(Seal) *Attorney-in-fact.*

Countersigned at Indianapolis, Ind.

By C. F. Kreis,

Authorized Agent.

27 Hartford Accident and Indemnity Company
Hartford, Connecticut

Power of Attorney

Know all men by these Presents, That Hartford Accident and Indemnity Company, a corporation duly organized under the laws of the State of Connecticut, and having its principal office in the City of Hartford, County of Hartford, State of Connecticut, does hereby make, constitute and appoint B. V. Havens of Indianapolis, Indiana, its true and lawful Attorney-in-fact, with full power and authority to sign, execute and acknowledge any and all bonds and undertakings on behalf of the Company in its business of guaranteeing the fidelity of persons holding places of public or private trust; guaranteeing the performance of contracts other than insurance policies; guaranteeing the performance of insurance contracts where surety bonds are accepted by states or municipalities; and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings or by law allowed, and to bind Hartford Accident and Indemnity Company thereby as fully and to the same extent as if such bonds and undertakings and other writings obligatory in the nature thereof were signed by an Executive officer of Hartford Accident and Indemnity Company and sealed and attested by one other of such officers, and hereby ratifies and confirms all that its said Attorney-in-fact may do in pursuance hereof.

This power of attorney is granted under and by authority of the following By-Law adopted by the Board of Directors of Hartford Accident and Indemnity Company at a meeting duly called and held on the 2nd day of June, 1914:

Article XIII (A)

Section 2. The Executive Officers of the Company shall have power and authority to appoint for purposes only of executing and attesting bonds and undertakings and other writings obligatory in the nature thereof, one or more Resident Vice-Presidents, Resident Assistant Secretaries and Attorneys-in-fact and at any time to remove any such Resident Vice-President, Resident Assistant Secretary, or Attorney-in-fact, and revoke the power and authority given him.

Section 5. Attorneys-in-fact shall have power and authority, subject to the terms and limitations of the power of attorney issued to them, to execute and deliver on behalf of the Company and to attach the seal of the Company thereto any and all bonds and undertakings, and other writings obligatory in the nature thereof, and any such instrument executed by any such Attorney-in-fact shall be as binding upon the Company as if signed by an Executive Officer and sealed and attested by one other of such officers.

In Witness Whereof, Hartford Accident and Indemnity Company has caused these presents to be signed by its Vice-President, and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, this 6th day of January, 1939.

Hartford Accident and Indemnity Company,
(signed) Wallace Stevens,
Vice-President.

(Corporate Seal)

Attest:
(signed) J. O. Lummis,
Assistant Secretary.

State of Connecticut, } ss.
County of Hartford. }

On this 6th day of January, A. D. 1939, before me personally came Wallace Stevens, to me known, who being by me duly sworn, did depose and say: that he resides in the City of Hartford, State of Connecticut; that he is the Vice-President of Hartford Accident and Indemnity Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

(signed) A. P. Whalen,
Notary Public.

(Notarial Seal)

My commission expires Feb. 1, 1941.

Certificate.

State of Connecticut, } ss.
County of Hartford. }

I, the undersigned, Assistant Secretary of the Hartford Accident and Indemnity Company, a Connecticut Corporation, Do Hereby Certify that the foregoing and attached Power of Attorney remains in full force and has not been revoked; and furthermore, that Article XIII (A), Sections 2 and 5, of the By-Laws of the Company, set forth in the Power of Attorney, is now in force.

Given under my hand and the seal of the company, at the City of Hartford, on December 7, 1939.

R. V. Ohern,
(Seal) *Assistant Secretary.*

28 (Entry for December 7, 1939, continued.)

And defendants also file statement of points, which is as follows:

29 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—63) * *

Filed Dec. 7, 1939.

STATEMENT OF POINTS.

Filed Dec. 7, 1939.

The defendants-appellants, Department of Treasury of the State of Indiana, and M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana, pursuant to Rule 75(d) of the Rules of Civil Procedure for the District Courts of the United States, now make this concise statement of the points on which the said defendants-appellants intend to rely on the appeal.

The defendants, as appellants on appeal, will rely upon the following points as supporting their contention that the
District Court committed error in its conclusions of
30 law numbered one and two, and in the entry of judgment on September 8, 1939, against said defendants-appellants, which conclusions and judgment were prejudicial to the defendants-appellants, and which said conclusions and judgment were to the effect that the plaintiff (ap-

pellee on appeal) recover from these defendants-appellants the sum of Five Thousand Nine-Hundred Twenty-One Dollars and forty-four cents ($5,921.44) with interest thereon, together with the costs of this action:

Point One: The defendants-appellants should not be required to refund, nor should the plaintiff-appellee recover, the sums designated in the judgment for the reason that the Five Thousand Nine-Hundred Twenty-One Dollars and forty-four cents ($5,921.44) there designated did not represent a tax imposed by the defendants-appellants measured by receipts derived from business conducted between the State of Indiana and other states of the United States.

Point Two: The defendants-appellants should not be required to refund, nor should the plaintiff-appellee recover, the sums designated in the judgment for the reason that the Five-Thousand Nine-Hundred Twenty-One Dollars and forty-four cents ($5,921.44) there designated did not represent a tax imposed by the defendants-appellants measured by gross income derived from business conducted between the State of Indiana and other states of the United States to the extent that such gross income is excepted from being utilized as a measure under the terms and provisions of Section 6(a) of Chapter 50, Indiana Acts of 1933 (pages 392-393), or Section 6(a) of Chapter 117, Indiana Acts of 1937 (page 615).

Respectfully submitted,

Omer Stokes Jackson,
Omer Stokes Jackson,
The Attorney General of Indiana,

31

Joseph W. Hutchinson,
Joseph W. Hutchinson,
Deputy Attorney General of Indiana,
Joseph P. McNamara,
Joseph P. McNamara,
Deputy Attorney General of Indiana,
Attorneys for defendants-appellants, Department of Treasury of the State of Indiana, and M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana.

219 Statehouse,
Indianapolis, Indiana.

32 (Entry for December 7, 1939, continued.)

Comes now the plaintiff by its attorneys and files notice of cross-appeal, which is as follows:

33 IN THE DISTRICT COURT OF THE UNITED STATES

Filed Dec. 7, 1939.

For the Southern District of Indiana,

Indianapolis Division.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff,*

vs.

Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana, *Defendants.*

No. 63 Civil.

NOTICE OF CROSS-APPEAL BY INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.

Filed Dec. 7, 1939.

Notice is hereby given that Ingram-Richardson Manufacturing Company of Indiana, Inc., plaintiff above-mentioned, hereby appeals to the Circuit Court of Appeals for the Seventh Circuit from that part of the final judgment entered in this action on September 8, 1939, to the effect that plaintiff take nothing from defendants in respect of that portion of the claim sued on arising from receipts from plaintiff's customers located in Indiana.

Earl B. Barnes,
Charles M. Wells,
Attorneys for said Ingram-Richardson Manufacturing Company of Indiana, Inc.

Fletcher Trust Building,
Indianapolis, Indiana.

Receipt of the foregoing notice of cross appeal is
34 hereby acknowledged this 6th day of December, 1939.

Omer Stokes Jackson,
The Attorney General,
Joseph W. Hutchinson,
Deputy Attorney General,
Joseph P. McNamara,
Deputy Attorney General,
Attorneys for Defendants.

35 (Entry for December 7, 1939, continued.)

And said plaintiff also files cross-appeal bond in the sum of $250.00 with Fred Bates Johnson as surety thereon, which bond is as follows:

Filed Dec. 7, 1939.

36 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—63) * *

CROSS-APPEAL BOND OF INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.

Filed Dec. 7, 1939.

Know all men by these presents that we, Ingram-Richardson Manufacturing Company of Indiana, Inc., as principal, and Fred Bates Johnson, as surety, are held and firmly bound unto the Department of Treasury of the State of Indiana, and M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana, in the full and just sum of $250.00, to be paid to said obligees, their successors or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, severally by these presents.

Sealed with our seals and dated this 6th day of December, 1939.

Whereas there was rendered on September 8, 1939, in the United States District Court for the Southern District of Indiana, Indianapolis Division, in a suit pending in said court between principal obligor herein, as plaintiff, and
37 obligees, as defendants, a judgment, part of which was against said obligor, and said obligor has duly filed a notice of a cross appeal therefrom to the United States Circuit Court of Appeals for the Seventh Circuit;

Now, therefore, the condition of the above obligation is such that if said obligor shall prosecute said cross appeal to effect and pay all costs if the cross appeal is dismissed or said part of said judgment affirmed, or such costs as said United States Circuit Court of Appeals may award upon modification of the judgment, then the above obligation shall be voided, otherwise to remain in full force and effect.

Ingram-Richardson Manufacturing
Company of Indiana, Inc.,
By R. S. Dukes,
Treasurer.
Fred Bates Johnson,
Surety.

United States of America
District of Indiana } ss.

Fred Bates Johnson of Indianapolis, Indiana, the surety on the within bond, being duly sworn on his oath, says that he is worth in his own name and right in unencumbered real estate, situate in the District aforesaid, and over and above the entire amount of his indebtedness and legal exemption, more than $1,000, which is less than the fair cash value of said real estate.

Fred Bates Johnson.

Subscribed and sworn to before me this 5th day of December, 1939.

Vera Cox,
Notary Public.

(Seal)

My commission expires February 17, 1942.

38 (Entry for December 7, 1939, continued.)

And plaintiff also files statement of points, which is as follows:

Filed Dec. 7, 1939.

39 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—63)

STATEMENT OF POINT BY INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.

Filed Dec. 7, 1939.

Said Ingram-Richardson Manufacturing Company of Indiana, Inc., pursuant to Rule 75 (d) of the Rules of Civil Procedure for the District Courts of the United States, now makes this concise statement of the point upon which said party intends to rely on its cross appeal.

Said party, in support of its contention that the District Court erred in its conclusion of law numbered three and in the entry of that part of the judgment on September 8, 1939, the effect of which was that plaintiff take nothing from defendants in respect of that portion of the claim sued on arising from receipts from plaintiff's customers located in Indiana, which said conclusion and said portion of the judgment were prejudicial to plaintiff, will rely upon the following point:

Plaintiff's said receipts, upon which $1,154.28, excluding interest, of the assessment involved is based, were from wholesale sales as defined in Section 3, a-3, of Chapter 117 of the Indiana Acts of 1937, and were therefore taxable at the rate of ¼ of 1% as originally returned and paid by plaintiff instead of 1% as assessed by defendant Department of Treasury of Indiana, which amount, with interest as provided by law, plaintiff was entitled to recover, in addition to the sum of $5,921.44, plus interest and costs, recovered in said judgment.

40

Respectfully submitted,

Earl B. Barnes,
Charles M. Wells,
Attorneys for Ingram-Richardson Manufacturing Company of Indiana, Inc.

Fletcher Trust Building,
Indianapolis, Indiana.

65 (Entry for December 7, 1939, continued.)

And the parties also file stipulation as to the record on appeal, which is as follows:

66 IN THE DISTRICT COURT OF THE UNITED STATES. Filed Dec. 7, 1939.

* * (Caption—63) * *

STIPULATION AS TO RECORD.

Filed Dec. 7, 1939.

It Is Hereby Stipulated between the parties in the above-entitled cause, pursuant to Rule 75(f) of the Rules of Civil Procedure for the District Courts of the United States, that instead of serving designations of the record as provided for in the aforementioned rules, the parties do now designate the following parts of the record, and the same shall be prepared by the Clerk of the Court for use on appeal and cross-appeal to the United States Circuit Court of Appeals for the Seventh Circuit:

1. Bill of complaint;
2. Appearances for defendants;
3. Answer of defendants;
4. All of the evidence, including the stipulation and the official court reporter's transcript of the evidence, and specifically including all exhibits and particularly plaintiff's exhibits A, B, C, D, E, F, G, and H;
5. Findings of fact;
6. Conclusions of law;
7. Final judgment entered September 8, 1939;
8. All order book entries in said cause not enumerated herein;

67 9. Notice of appeal by defendants-appellants;

10. Appeal bond;
11. Defendants-appellants' statement of points to be relied upon;
12. Notice of appeal by plaintiff-appellee;
13. Cross-appeal bond;
14. Plaintiff-appellee's statement of points to be relied upon;
15. This stipulation as to the designation of parts of the record;
16. Clerk's certificate to transcript of record.

In Witness Whereof we have hereunto set our hands this 6th day of December, 1939.

Earl B. Barnes,
Charles M. Wells,
As attorneys for the plaintiff-appellee, Ingram-Richardson Manufacturing Company of Indiana, Inc.

Omer Stokes Jackson,
Attorney General,
Joseph W. Hutchinson,
Deputy Attorney General,
Joseph P. McNamara,
Deputy Attorney General,
As attorneys for the defendants-appellants, Department of Treasury of the State of Indiana, and M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana.

Entered Jan. 15, 1940. 68 And afterwards to wit at the November Term of said Court, on the 15th day of January, 1940, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

It appearing to the Court that it is necessary and proper that the original exhibits hereinafter enumerated should be inspected by the United States Circuit Court of Appeals for the Seventh Circuit upon the appeal to said Court, and that the said original exhibits should be sent to said Circuit Court of Appeals in lieu of copies thereof;

It Is, Therefore, Ordered that the following exhibits be transmitted by the Clerk of this Court to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit at Chicago, Illinois, and that, pursuant to the rules of the said Circuit Court of Appeals on a final determination of the appeal to said Court, said exhibits be returned to the Clerk of this Court:

1. Plaintiff's Exhibit A, a photograph;
2. Plaintiff's Exhibit B, a photograph;
3. Plaintiff's Exhibit C, a photograph;
4. Plaintiff's Exhibit D, a photograph;

5. Plaintiff's Exhibit E, an order;
6. Plaintiff's Exhibit F, an order;
7. Plaintiff's Exhibit G, an order;
8. Plaintiff's Exhibit H, an order.

69 United States of America
Southern District of Indiana } ss.
Indianapolis Division

I, Albert C. Sogemeier, Clerk of the United States District Court in and for the Southern District of Indiana, do hereby certify that the above and foregoing is a true and full transcript of the record and proceedings in the cause of Ingram-Richardson Manufacturing Company of Indiana, Inc., *vs.* Department of Treasury of the State of Indiana, et al, No. 63 Civil, according to the stipulation as to record filed on December 7, 1939, now remaining among the records of said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Indianapolis, this 15th day of January, 1940.

Albert C. Sogemeier,
(Seal) *Clerk, United States District Court,*
Southern District of Indiana.

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UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed record, printed under my supervision and filed on the fourteenth day of February, 1940, in the following entitled causes:

Ingram-Richardson Manufacturing Company of Indiana, Inc.,
Plaintiff-Appellee,

7198 *vs.*

Department of Treasury of the State of Indiana, *et al.*,
Defendants-Appellants,

Ingram-Richardson Manufacturing Company of Indiana, Inc.,
Plaintiff-Appellant,

7199 *vs.*

Department of Treasury of the State of Indiana, *et al.*,
Defendants-Appellees,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 11th day of December, A. D. 1940.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

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At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit held in the city of Chicago and begun on the third day of October, in the year of our Lord one thousand nine hundred and thirty-nine, and of our Independence the one hundred and sixty-fourth.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellant,*
7198 *vs.*
Department of Treasury of the State of Indiana, *et al.*, *Defendants-Appellants.*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

And, to-wit: On the sixteenth day of January, 1940, there was filed in the office of the Clerk of this Court, a certificate to exhibits which said certificate is in the words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Southern District of Indiana,

Indianapolis Division.

Ingram-Richardson Manufacturing Company of Indiana, Inc.,
vs.
Department of Treasury of the State of Indiana, *et al.*

No. 63 Civil.

I, Albert C. Sogemeier, Clerk of the United States District Court in and for the Southern District of Indiana, do hereby certify that this envelope contains the following original exhibits.

Plaintiff's Exhibit A, a photograph;
Plaintiff's Exhibit B, a photograph;
Plaintiff's Exhibit C, a photograph;
Plaintiff's Exhibit D, a photograph;
Plaintiff's Exhibit E, an order;
Plaintiff's Exhibit F, an order;
Plaintiff's Exhibit G, an order;
Plaintiff's Exhibit H, an order;

which are being transmitted in accordance with an order of Court, made and entered on January 15, 1940.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Indianapolis, this 15th day of January, 1940.

Albert C. Sogemeier,
(Seal) *Clerk.*

Endorsed: Filed Jan. 16, 1940. Frederick C. Campbell, Clerk.

And afterwards, to-wit: On the twenty-second day of January, 1940, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellants, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7198. October Term, 1940.

Ingram-Richardson Mfg. Co.,
Plaintiff-Appellee,

vs.

Department of Treasury, etc.,
Defendants-Appellants,

The Clerk will enter my appearance as counsel for the Defendant-Appellant.

Joseph W. Hutchinson,
Deputy Attorney General,
Joseph P. McNamara,
Deputy Attorney General,
219 Statehouse,
Indianapolis, Indiana.

Endorsed: Filed Jan. 22, 1940. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the tenth day of June, 1940, the following proceedings were had and entered of record, to-wit:

Monday, June 10, 1940.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellee,*
7198 *vs.*
Department of Treasury of the State of Indiana, *et al.*, *Defendants-Appellants,*

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellee,*
7199 *vs.*
Department of Treasury of the State of Indiana, *et al.*, *Defendants-Appellants,*

Appeals from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

Now this day come the parties by their counsel, and these causes come on to be heard on the transcript of the record and the briefs of counsel, and on oral argument by Messrs. Charles M. Wells and Earl B. Barnes, counsel for Ingram-Richardson Manufacturing Company of Indiana, Inc., and by Mr. Joseph P. McNamara, counsel for the State of Indiana, and the Court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the twentieth day of July, 1940, there was filed in the office of the Clerk of this Court, the opinion of the Court, which said opinion is in the words and fiures following, to-wit:

IN THE UNITED STATE CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

October Term, 1939, April Session, 1940.

No. 7198.
INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.,
Plaintiff-Appellee,
vs.
DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, *et al.*,
Defendants-Appellants.

No. 7199.
INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.,
Plaintiff-Appellant,
vs.
DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, *et al.*,
Defendants-Appellees.

On Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

July 20, 1940.

Before SPARKS and MAJOR, *Circuit Judges,* and LINDLEY, *District Judge.*

MAJOR, *Circuit Judge.* This is an action to recover the amount of $7177.61, taxes collected by the defendants from the plaintiff under the provisions of the Indiana Gross Income Tax Act (Chap. 117 of the Indiana Acts of 1937, pages 604-645). Of the foregoing, the recovery of $5410.20 was sought upon the theory that it represented an assessment of taxes measured by receipts derived from transactions in commerce between Indiana and other states to which plaintiff was entitled to the exemption specified in Section 6 (a) of Chapter 117 of the Indiana Acts of 1937 (at page 615). The plaintiff sought the recovery of $1154.26 of the amount first mentioned above, upon the theory that it represented taxes assessed upon receipts

derived from wholesale sales, as that term is defined by Section 3 (a) of the Act.

The court below sustained plaintiff's contention as to the sum of $5410.20 and entered judgment against the defendants. The appeal in No. 7198 is by the defendants from this judgment.

The court below denied plaintiff's contention as to the sum of $1154.26, and entered judgment against the plaintiff. The appeal in No. 7199 is by the plaintiff from this judgment. Both appeals may be appropriately considered and disposed of in one opinion.

Plaintiff owns and operates an enameling factory at Frankfort, Indiana, in which are installed various machines, ovens and equipment. It is engaged in the manufacture of enamel, a vitreous substance of fluorspar, cobalt oxide, soda ash, etc., both in a granular form known in the industry as frit, and in a hard finished form, fused with metal parts. In the transactions or business from which the gross income was received, and upon which the tax was laid, the enamel was fused with metal parts used in stoves and refrigerators, manufactured by plaintiff's customers located in Indiana and other states. Plaintiff's traveling salesmen originally solicited and negotiated what are referred to as "purchase orders" from such customers. After the acceptance of these orders by the plaintiff, the metal parts to be enameled were transported by plaintiff's trucks from the customer's place of business, both within and without Indiana, to plaintiff's place of business at Frankfort. After the completion of the enameling process, the identical parts were returned to customers, also by plaintiff's trucks. The stove and refrigerator parts were then incorporated as an integral part into stoves or refrigerators, which were manufactured by plaintiff's customers. Thereafter, plaintiff billed such customers for said enameling, and remittances were made to plaintiff by mail to its Frankfort office.

In Appeal No. 7198, the question involved is whether the transactions of plaintiff were in interstate commerce so as to make the gross income therefrom immune from taxation under Article I, Section 8, of the United States Constitution.

In Appeal No. 7199, the question involved is whether plaintiff's income was from "wholesale sales" as defined by the Act. If so, it was liable only for a tax at the rate

of one-fourth of one per cent; otherwise it was liable at the rate of one per cent. It is the difference which plaintiff contends was illegally collected and which it now seeks to recover.

In Appeal No. 7198, it is argued by the plaintiff that (1) its gross income was from the sale of goods in interstate commerce, and that (2) if not the sale of goods, the income was from services rendered in interstate commerce. As to (1), we disagree with plaintiff's contention. This question, however, is determinative of the question raised in Appeal No. 7199, discussed hereinafter.

The Act in question imposes a tax upon the receipt of gross income measured by the amount or volume thereof. Defendants concede that the gross income involved was derived from the performance of service, but deny that such service was rendered in interstate commerce. The argument revolves to a considerable extent, around Section 6 of the Act, which provides that there shall be excepted from the gross income, taxable under the Act, that portion of the income derived from business conducted in commerce between the states "but only to the extent to which the State of Indiana is prohibited from taxing such gross income by the Constitution of the United States of America." It is argued that this is an exemption provision in favor of the taxpayer and the burden is upon the taxpayer to bring itself within its terms. It is our view that this is not an exemption provision, but merely a limitation, in conformity with the commerce clause, upon the power of the state to tax. In other words, this provision neither adds to, nor detracts from, the rights of either the taxpayer or the state.

Whether this view be correct or not, however, the question remains as to whether plaintiff's income received from customers in other states was of an interstate character, which made it immune from taxation. Defendants' argument is predicated upon the theory that the income was received solely from the enameling process performed in plaintiff's Indiana factory. There is some support for this basis in the court's finding of facts, but a reading of the entire findings makes it plain, we think, that the income received was for the total service rendered by the plaintiff, which included the enameling process. Other services which entered into the income were the solicitation of orders by plaintiff's agents, and the execution of

contracts, both in other states. Also included in the service was the transportation by plaintiff of the stove and refrigerator parts from points in other states, and the return transportation of such parts by plaintiff after the completion of the enameling process. There was also included, communications by mail, telephone and telegraph between plaintiff and customers located in other states.

As bearing upon the precise question involved, each side cites one case only. Plaintiff relies upon *Gwin, White & Prince, Inc.* v. *Henneford, et al.*, 305 U. S. 434, and defendants rely upon *Western Live Stock et al.* v. *Bureau of Revenue, et al.*, 303 U. S. 250. In the former case the State of Washington sought to collect a gross receipts tax upon gross revenue from services derived by a corporation as marketing agent for growers of fruit. Representatives of the corporation, at various points outside the state, negotiated sales of the fruit on behalf of the corporation, executed contracts of sale, effected delivery of the shipments to the purchasers, and collected and remitted the purchase price. The corporation income consisted of the compensation for the entire service, which was at a stipulated rate per box of fruit sold. The court held such services to be within the protection of the commerce clause of the Federal Constitution, and in doing so, on page 438, said:

> "* * * A substantial part of it is outside the state where sales are negotiated and written contracts of sale are executed, and where deliveries and collections are made. * * *"

In the Western Live Stock case, the court held, page 253:

> "That the mere formation of a contract between persons in different states is not within the protection of the commerce clause, * * * Nor is taxation of a local business or occupation which is separate and distinct from the transportation and intercourse which is interstate commerce forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by the business. * * *"

In that case the court distinguished between income received from a contract entered into in another state and income from its performance. That is the distinction which defendants seek here to make. In other words, its position, if sustained, must be upon the premise that the

income was received solely from the services rendered at Frankfort, Indiana. As stated, we do not believe this premise is sound and it follows that the argument based thereon must fail.

While the question is not free from doubt, we are of the opinion that the reasoning employed in the case of Gwin, White & Prince, Inc., is applicable. We therefore conclude that the state was without authority to assess and collect the tax involved, and the judgment of the District Court in this respect is affirmed.

In Appeal No. 7199, plaintiff contends that its gross income was from receipts from "wholesale sales" as defined in Section 3 (a) 3. The material language of such section is:

> "* * * The term 'wholesale sales' means and includes only the following: * * * (3) Sales of any tangible personal property which is to be incorporated by the purchaser as a material or an integral part into tangible property produced by such purchaser in the business of manufacturing, assembling, constructing, refining, or processing; * * *"

Defendants contend that plaintiff's income was taxable under Section 3 (f) of the Act, which imposes the tax upon "gross income from professional services, personal services, or services of any character whatsoever, * * *"

Plaintiff's contention, if sustained, must be upon the basis that it was engaged in the sale of tangible personal property rather than in the sale of a service. It argues that its business consists of the sale of the material which was used in connection with the enameling process, that title to the stove and refrigerator parts, received from its customers, passed to it, and that when the finished product was returned to the customer, a sale was effected and the title reconveyed to the customer. Stress is placed upon the finding that after the enameling process had been completed, the value of the finished product was two or three times greater than it was before. We are of the view that plaintiff's contention cannot be sustained. Clearly, we think its income was derived from the rendition of service, which included numerous elements such as labor, transportation and equipment expense. True, there was included the value of the material. Just what part of the total income this represented, the record does not disclose, but even if it did, it would not, in our opinion, con-

stitute a sale within the meaning of the Act. The acts of the parties themselves indicate that they did not regard the transaction as a sale or as passing title. When the stove or refrigerator parts were received by the plaintiff, no payment was made or credit extended to the customer, and no charge made against the plaintiff, and when returned, no charge was made against the customer for the original part. The identity of the original part was not destroyed by the enameling process and the part returned to the customer was the identical part received from the customer.

We agree with the defendants that the relation between plaintiff and its customers was nothing more than that of bailor and bailee. The distinction between a sale and bailment, as made by the court in *Sturm* v. *Boker*, 150 U. S. 312, is pertinent. On page 329, the court said:

> "* * * The recognized distinction between bailment and sale is that when the identical article is to be returned in the same or in some altered form, the contract is one of bailment, and the title to the property is not changed. * * *"

We therefore conclude that plaintiff's income was not from sales of property, but from service. The judgment in favor of the defendants is

AFFIRMED.

Endorsed: Filed July 20, 1940. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the Twentieth day of July, 1940, the following further proceedings were had and entered of record, to-wit:

Saturday, July 20, 1940.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellee,*
7198 *vs.*
Department of Treasury of the State of Indiana, *et al.*, *Defendants-Appellants,*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed, with costs, and interest from the date of the judgment of said District Court until paid, at the same rate that similar judgments bear in the Courts of the State of Indiana.

And afterwards, to-wit: On the second day of August, 1940, there was filed in the office of the Clerk of this Court, a petition for a rehearing, which said petition for a rehearing is not copied here.

And afterwards, to-wit: On the twelfth day of August, 1940, there was filed in the office of the Clerk of this Court, an answer to petition for a rehearing, which said answer is not copied here.

And afterwards, to-wit: On the fifth day of October, 1940, the following further proceedings were had and entered of record, to-wit:

Saturday, October 5, 1940.

Court met pursuant to adjournment.
Before:

Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellee,*
7198 *vs.*
Department of Treasury of the State of Indiana, *et al.*, *Defendants-Appellants.*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, denied.

And afterwards, to-wit: On the tenth day of October, 1940, there was filed in the office of the Clerk of this Court, a motion for stay of issuance of mandate, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

Seventh Circuit.

Ingram-Richardson Manufacturing Company of Indiana, Inc.. *Plaintiff-Appellee,* *vs.* Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana, *Defendants-Appellants.*	No. 7198

MOTION FOR STAY OF ISSUANCE OF MANDATE.

The appellants, Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana, now move the Court to enter an order withholding the mandate in this case because it is the bona fide intention of the appellants to make a proper application to the Supreme Court of the United States for a Writ of Certiorari in this case, and in support of this motion, the appellants attach the professional statement of its counsel.

Samuel D. Jackson,
Attorney General of Indiana.

Joseph W. Hutchinson,
Deputy Attorney General,

Joseph P. McNamara,
Deputy Attorney General,
Counsel for Appellants.

I, Joseph P. McNamara, certify that it is the bona fide intention of the appellants in the above-entitled case to make an application to the Supreme Court of the United States for a Writ of Certiorari within the time limited by law, and I believe there is merit in appellants' case and that the judgment of the United States Circuit Court of

Appeals for the Seventh Circuit in said case ought to be reversed by the Supreme Court of the United States.

Dated this 9th day of October, 1940.

Joseph P. McNamara
Indianapolis, Indiana.

The Ingram-Richardson Manufacturing Company of Indiana, Inc., appellee, by its counsel, acknowledges service of above Motion for Stay of Mandate and receipt of copy of said Motion on October 9, 1940. On October 9, 1940, the undersigned was informed of said Motion and notified that it would be filed at once.

Barnes, Hickam, Pantzer & Boyd,
Earl B. Barnes,
Charles M. Wells,
Attorneys for Appellees.

Endorsed: Filed Oct. 10, 1940. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the sixteenth day of October, 1940, the following further proceedings were had and entered of record, to-wit:

Wednesday, October 16, 1940.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellee,*
7198 *vs.*
Department of Treasury of the State of Indiana, *et al.*, *Defendants-Appellants.*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

On motion of counsel for appellants, it is ordered that the mandate of this Court in this cause be, and it is hereby, stayed pursuant to Rule 25 of the rules of this Court.

And afterwards, to-wit: On the fourteenth day of November, 1940, there was filed in the office of the Clerk of this Court a motion for a further stay of mandate, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

Seventh Circuit.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellee,* *vs.* Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana, *Defendants-Appellants.*	No. 7198

MOTION FOR STAY OF ISSUANCE OF MANDATE.

The appellants, Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana, now move the Court to enter an order further withholding the mandate in this case because it is the bona fide intention of the appellants to make a proper application to the Supreme Court of the United States for a Writ of Certiorari in this case, and appellants now respectfully represent that numerous other engagements and the preparation of other briefs have prevented the appellants from perfecting their application to the Supreme Court of the United States for a Writ of Certiorari within the time that the mandate was originally stayed by this Court, and in support of this motion the appellants attach the professional statement of their counsel.

Samuel D. Jackson,
Attorney General of Indiana.
Joseph W. Hutchinson,
Deputy Attorney General,
Joseph P. McNamara,
Deputy Attorney General,
Counsel for Appellants.

I, Joseph P. McNamara, certify that it is the bona fide intention of the appellants in the above-entitled case to make an application to the Supreme Court of the United States for a Writ of Certiorari within the time limited by law, and I believe there is merit in appellants' case and that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit in said case ought to be reversed by the Supreme Court of the United States.

Dated this thirteenth day of November, 1940.

Joseph P. McNamara
Indianapolis, Indiana.

The Ingram-Richardson Manufacturing Company of Indiana, Inc., appellee, by its counsel, acknowledges service of above Motion for Stay of Mandate and receipt of copy of said Motion on November 13, 1940. On November 13, 1940, the undersigned was informed of said Motion and notified that it would be filed at once.

Earl B. Barnes,
Charles M. Wells,
Attorneys for Appellee.

Endorsed: Filed Nov. 14, 1940. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the fifteenth day of November, 1940, the following further proceedings were had and entered of record, to-wit:

Friday, November 15, 1940.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellee,*
7198 *vs.*
Department of Treasury of the State of Indiana, *et al.*, *Defendants-Appellants.*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

It is ordered that the motion of counsel for appellants for a further stay of issuance of the mandate of this Court in this cause be, and it is hereby, granted.

And afterwards, to-wit: On the twentieth day of November, 1940, there was filed in the office of the Clerk of this Court, a praecipe for record, which said praecipe is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

Seventh Circuit.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellee,* *vs.* Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana, *Defendants-Appellants.*	No. 7198.

To the Honorable Kenneth J. Carrick, Clerk, U. S. Circuit Court of Appeals for the Seventh Circuit, 1212 Lake Shore Drive, Chicago, Illinois:

The defendants-appellants in the above cause respectfully request that you prepare for use in the presentation of a petition for certiorari a true and complete copy of the record in the above entitled cause, including but not in limitation thereof, a copy of the printed record filed in the United States Circuit Court of Appeals in said cause, and a full, true and complete copy of the proceedings had in said Circuit Court of Appeals, certified under your hand and the seal of the Court.

Samuel D. Jackson,
Attorney General of Indiana,
Joseph W. Hutchinson,
Deputy Attorney General,
Joseph P. McNamara,
Deputy Attorney General,
Attorneys for Defendants-Appellants.

Endorsed: Filed Nov. 20, 1940. Kenneth J. Carrick, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit held in the city of Chicago and begun on the third day of October, in the year of our Lord one thousand nine hundred and thirty-nine, and of our Independence the one hundred and sixty-fourth.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellant,*
7199 *vs.*
Department of Treasury of the State of Indiana, *et al.*, etc., *Defendants-Appellees.*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

And, to-wit: On the twentieth day of July, 1940, the following further proceedings were had and entered of record, to-wit:

Saturday, July 20, 1940.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellant,*
7199 *vs.*
Department of Treasury of the State of Indiana, *et al.*, etc., *Defendants-Appellees.*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by

this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed, with costs, and interest from the date of the judgment of said District Court until paid, at the same rate that similar judgments bear in the Courts of the State of Indiana.

And afterwards, to-wit: On the third day of August, 1940, there was filed in the office of the Clerk of this Court, a petition for a rehearing, which said petition for a rehearing is not copied here.

And afterwards, to-wit: On the fifth day of October, 1940, the following further proceedings were had and entered of record, to-wit:

Saturday, October 5, 1940.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellant,*
7199 *vs.*
Department of Treasury of the State of Indiana, *et al.*, etc., *Defendants-Appellees.*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, denied.

And afterwards, to-wit: On the sixteenth day of October, 1940, the following further proceedings were had and entered of record, to-wit:

Wednesday, October 16, 1940.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellant,*
7199 *vs.*
Department of Treasury of the State of Indiana, *et al.*, etc., *Defendants-Appellees.*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

On motion of counsel for appellant, it is ordered that the mandate of this Court in this cause be, and it is hereby, stayed pursuant to Rule 25 of the rules of this Court.

And afterwards, to-wit: On the fifteenth day of November, 1940, the following further proceedings were had and entered of record, to-wit:

Friday, November 15, 1940.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellant,*
7199 *vs.*
Department of Treasury of the State of Indiana, *et al.*, etc., *Defendants-Appellees.*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

It is ordered that the motion of counsel for appellant for a further stay of issuance of the mandate of this Court in this cause be, and it is hereby, granted.

And afterwards, to-wit: On the sixteenth day of December, 1940, the following further proceedings were had and entered of record, to-wit:

Monday, December 16, 1940.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellant,*
7199 *vs.*
Department of Treasury of the State of Indiana, *et al.*, etc., *Defendants-Appellees.*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

On motion of counsel for appellant, it is ordered that the issuance of the mandate of this Court in this cause be, and it is hereby, stayed for a further period of thirty days.

And afterwards, to-wit: On the seventeenth day of December, 1940, there was filed in the office of the Clerk of this Court, a praecipe for record, which said praecipe is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellant,* *vs.* Department of Treasury of the State of Indiana, *et al.*, *Defendants-Appellees.* } No. 7199.

PRAECIPE.

To the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, Chicago, Illinois:

Ingram-Richardson Manufacturing Company of Indiana, Inc., plaintiff-appellant in the above-entitled cause, respectfully requests that you prepare for use in the presentation of a petition for certiorari a true and complete copy of each of the following proceedings had and papers filed in said cause:

1. Printed record filed in said cause. (Already prepared.)
2. Proceedings had and entered of record on June 10, 1940. (Already prepared.)
3. Opinion of the court filed July 20, 1940. (Already prepared.)
4. Judgment entered on July 20, 1940. (To be added.)
5. A recitation of the filing of petition for rehearing but omitting said petition itself. (To be added.)
6. Order of the court entered October 5, 1940, denying plaintiff's petition for rehearing. (To be added.)
7. Each order of the court staying mandate. (To be added.)

all certified under your hand and seal of the court.

Barnes, Hickam, Pantzes & Boyd,
Earl B. Barnes,
Charles M. Wells,
Attorneys for Plaintiff-Appellant.

Endorsed: Filed Dec. 17, 1940. Kenneth J. Carrick, Clerk.

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CLERK'S CERTIFICATE.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of proceedings had and papers filed (except briefs of counsel and petition for rehearing) in the following entitled cause:

Cause No. 7198

Ingram-Richardson Manufacturing Company of Indiana, Inc.,

Plaintiff-Appellee,

vs.

Department of Treasury of the State of Indiana, *et al.*,

Defendants-Appellants,

and a true copy of proceedings had and papers filed (except briefs of counsel, petition for rehearing, motions for stay of mandate) in the following entitled cause:

Cause No. 7199

Ingram-Richardson Manufacturing Company of Indiana, Inc.,

Plaintiff-Appellant,

vs.

Department of Treasury of the State of Indiana, *et al.*,

Defendants-Appellees,

as the same remain upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 19th day of December, 1940.

(Seal)

Kenneth J. Carrick,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

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SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 3, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(2922)